BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM FEENEY	)	
Claimant	)	
	)	
VS.	)	
	)	
FAITH ROOFING COMPANY, INC.	)	
Respondent	)	Docket No. 1,040,609
	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requests review of the June 10, 2009 preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders (ALJ).

ISSUES

The ALJ found that the claimant's left knee injury arose out of and the course of his employment with respondent and awarded him benefits. The respondent requests review of this decision and alleges the ALJ erred in a number of ways. First, respondent alleges the ALJ exceeded her authority in granting relief requested by the claimant. Respondent next alleges the ALJ erred in concluding claimant sustained personal injury by accident and that his resulting injury arose out of and the course of his employment. Finally, respondent alleges the ALJ's findings are contrary to the preponderance of the credible evidence in the record and are inconsistent with the Act. Accordingly, respondent urges the Board to reverse and vacate the ALJ's Order. Claimant contends the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant has a history of a previous left knee injury in 1992 that required surgical treatment including reconstruction of his ACL with patella tendon autograft. Claimant returned to his normal activities after that surgery, including work and a variety of sports. Claimant testified that he wore a knee brace while engaging in sports activities and had no further problems with his knee until May 15, 2008.

It is uncontroverted that claimant slipped at a work site and felt an immediate onset of pain and swelling in his left knee on May 15, 2008. Claimant tore his ACL once again and requires treatment. But a dispute has arisen between the parties as to the source of claimant's present need for treatment.

Respondent contends claimant's torn ACL was not caused by his work accident but rather, is due to his significant preexisting history, dating back to 1992. Dr. Gerald F. Dugan, the authorized treating physician examined claimant on June 4, 2008 and concluded as follows:

> With the MRI changes, I do not feel this is an acute injury. I do not doubt that he does have some ACL instability, however, I do not feel this instability is a direct result of the injury he sustained on or about 5/13/08, while performing his regular job duties for Faith Roofing Company as a roofer.[1]

Claimant's attorney referred claimant to Dr. Edward Prostic for an evaluation which occurred on September 19, 2008. Dr. Prostic opined that claimant suffered an acute rupture of his ACL reconstruction and that surgery was recommended.

Given this diversity of opinions as to the cause of his present need for treatment, the ALJ referred claimant to Dr. Daniel Stechschulte for an evaluation. Like the other physicians, Dr. Stechschulte diagnosed a complete tear of the ACL, a small effusion and an increased signal within the posterior horn of the medial meniscus. His report indicates that he reviewed the x-rays which showed the ACL to be absent without ligamentous remnants. He further opined that based on the MRI which was taken on 5/22/2008,

> . . . Mr. Feeney's ACL tear pre-dated his reported injury of 05/15/2008. The MRI was obtained one week after the alleged injury and as such would be expected at least to demonstrate an effusion, bony edema, and evidence of an ACL graft remnant, if the injury of 05/15/2008 were to have caused Mr. Feeney's ACL tear. His MRI does not even show a torn ACL; it shows complete absence of an ACL - a situation that cannot develop in a week.[2]

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[1] P.H. Trans., Resp. Ex. A at 3 (Dr. Dugan's June 4, 2008 report).

[2] Dr. Stechschulte's IME Report at 3 (dated Feb. 20, 2009).

He went on to say that "[w]hile the possibility exists, that the injury in question exacerbated his pre-existing condition, and in fact, probably did so, it is clear to me that this injury was not the prevailing or primary cause of his knee instability and his current need for ACL reconstruction."[3]

The ALJ entered an order on March 31, 2009 denying claimant's request for treatment after having concluded "[t]he evidence is insufficient at this time to establish that [c]laimant's current knee injury arose out of and in the course of [c]laimant's employment with [r]espondent."[4] This Order was not appealed.

A second preliminary hearing was held and additional testimony was offered from claimant and from Pamela Renee Nickerson, the claims representative assigned to this claim. There was no new additional medical testimony. Following that preliminary hearing, the ALJ entered the Order which is the focus of this appeal. She entered an order granting claimant's request for treatment. The ALJ explained that the underlying facts of this claim were "on point with the holding of the *Hanson* case."[5]

Respondent contends that the greater weight of the medical testimony supports its belief that claimant's present need for repair to his ACL is due to his 1992 accident and not from the relatively insignificant slip on May 15, 2008. Respondent argues that both Dr. Dugan and Dr. Stechschulte have opined that the May 15, 2008 accident did not give rise to a torn ACL. In fact, Dr. Stechschulte noted that claimant's tear must have predated his May 15, 2008 accident as the MRI does not reveal any effusion, bony edema or any existence of ACL whatsoever, items one would expect to see in such a knee. Moreover, he indicated that the MRI does not show a torn ACL, but rather it revealed the complete absence of an ACL, "a situation that cannot develop in a week."[6]

Claimant maintains that Dr. Stechschulte's findings with respect to the MRI are inconsistent with those of Dr. Dugan and Dr. Prostic. Nevertheless, claimant argues that his May 15, 2008 accident is compensable under the principles set forth in *Hanson*.[7] *Hanson* stands for the proposition that when a work-related event causes aggravation of a preexisting condition, the employee is entitled to compensation for any increase in the amount of functional impairment. The test is not whether the job-related activity or injury

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[3] *Id.*

[4] ALJ Order (Mar. 31, 2009) at 1.

[5] ALJ Order (Jun. 10, 2009) at 2.

[6] Dr. Stechschulte's IME Report at 3 (dated Feb. 20, 2009).

[7] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[8]

It is clear from this record that neither Dr. Dugan or Dr. Stechschulte are well-versed in Kansas law. There is no doubt that claimant's knee was fragile and prone to further injury as a result of his 1992 accident and resulting surgical treatment. Nevertheless, it is uncontroverted that claimant had an excellent recovery from that accident, he returned to his active lifestyle and worked in the construction industry with no adverse effects or any need for further treatment, at least until May 15, 2008. On that date, he suffered an acute injury which necessitated medical evaluation and now, treatment.

Even Dr. Stechschulte allows for the possibility - indeed probability - that claimant's May 15, 2008 accident aggravated claimant's knee. Thus, under *Hanson* and our well settled law,[9] the ALJ's Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[10] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated June 10, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier

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[8] *Id.*, Syl ¶ 3.

[9] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[10] K.S.A. 44-534a.

Rebecca Sanders, Administrative Law Judge